

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Modern Rules of Procedure
for the Issuance of Advisory Opinions
in Nature of Service Proceedings

Docket No. RM2012-4

REPLY COMMENTS OF THE PUBLIC REPRESENTATIVE

(July 17, 2012)

I. INTRODUCTION

In Order No. 1309, the Commission invited suggestions on ways to improve and expedite the handling of N-cases, consistent with due process.¹ This submission follows up on selected points raised in comments filed in response to this invitation.

II. DOES THE *CITIZENS' AWARENESS* DECISION PROVIDE ADEQUATE PRECEDENT FOR MAJOR STREAMLINING?

The Commission's inquiry as to whether the *Citizens' Awareness Network v. U.S.* decision supports major streamlining of N-cases is a threshold issue. An opportunity for additional review of this case since the filing of initial comments leads to the conclusion that it does not provide definitive support for major streamlining of N-cases.

Instead, the factual and legal context of the decision reveals that

¹ See Order No. 1309, Advance Notice of Proposed Rulemaking on Modern Rules of Procedure for Nature of Service Cases under 39 U.S.C. 3661, April 10, 2012 (Advance Notice). The Advance Notice appears at 77 FR 23177 (April 18, 2012).

the *Citizens Awareness* case concerned what set of procedures would legally suffice in an NRC *licensing* proceeding.

The Administrative Procedure Act (APA) specifically exempts licensing from APA hearing requirements, unless provided otherwise by statute. In the case of the NRC, a statutory provision backfills the APA's licensing exclusion by requiring a "hearing on the record" in nuclear plant licensing proceedings.² The meaning of this phrase — which notably does not include a reference to sections 556 and 557 — is what led to the *Citizens Awareness* case.

Thus, the crux of the legal question before the court in *Citizens Awareness* was what sort of procedures the NRC was legally required to provide under its organic statute's less expansive reference to "a hearing on the record," *not* what is required for "a hearing on the record under sections 556 and 557 of title 5," as specified in section 3661. As Commission Order No. 1309 indicates, the court concluded that the generic reference to a hearing in the NRC statute (which did not explicitly invoke sections 556 and 557) does not mandate full-blown trial-type proceedings. That result was a legally sound conclusion under the law applicable to the NRC, but does not translate seamlessly to the Commission's situation.

Accordingly, the *Citizens Awareness* decision does not support for a major departure in practice for N-cases at the Commission. Importantly, however, this conclusion does not preclude the Commission from actively exploring ways to expedite N-cases. Even under the sections 556-557 umbrella, the Commission has considerable leeway to control N-case proceedings, which have grown to resemble Reorganization-era omnibus rate and classification cases in some respects, without unduly compromising due process. It might also want to consider the use of special rules of practice, in the event another N-case is filed before completion of this rulemaking.

Expediting N-cases is not important simply because of the Postal Service's financial situation (although some consider this a sufficient rationale), but also because an extended proceeding can jeopardize the currency of an N-case proposal,

² License renewals are a different issue.

participants' critiques, and the Commission's opinion and thereby undermine the very reason for a having a statutory N-case process.

III. SELECTED SUGGESTIONS

A. General Observations

Some commenters offer specific suggestions for changes in Commission procedures for N-cases, apart from (or in addition to) those that might be directly linked to more streamlined proceedings under a *Citizens Awareness*-type approach. The most extensive set of suggestions were filed by the United States Postal Service and Valpak.

Considered at the "bird's eye view" level, without regard to the proponent, the suggestions for ways to expedite N cases can be seen as demanding both more — and less — from the Commission, the Postal Service, and all other stakeholders. In short, they show that "something's got to give" in some areas if N-case decision-making is to be expedited, but that well-chosen checks and balances can minimize, if not eliminate, harm to the interests of the general public.

In general, the suggestions necessarily require the Commission to assume much more control over N-cases, from start to finish, than it has in the past and to commit (typically) to less time to issue a decision than it might otherwise consider optimum.

Similarly, some of the suggestions place more demands on the Postal Service in terms of its original filing and responses to questions. The Postal Service would also have to live with less in terms of its ability to file material sealed against inspection.

Participants could face shorter turn-around times for deciding to intervene. In addition, while the right to challenge Postal Service witnesses should survive, the method of doing so would change under some suggestions (with questions funneled through the Presiding Officer) or there would be a numerical limit on questions. The ability, as of right, for a participant to present an alternative direct case would also be eliminated under one approach.

The challenge is for the Commission to determine how individual suggestions advance the main objective, which is issuance of a sound and timely decision, following an opportunity for interested persons to understand and probe the Postal Service's proposal. And, while all may "lose" something relative to existing rules, the overall result should be an improved framework for N-cases.

B. Some Specific Observations

The following discussion reflects time constraints due to other work obligations, so the order of discussion does not necessarily reflect relative importance. In addition, the selection of topics is not exhaustive.

1. The Postal Service Proposes Prohibiting Alternative Proposals

The Postal Service suggests the Commission could expedite issuance of advisory opinions by foreclosing participants from presenting affirmative alternative proposals ("direct cases").

A review of past N-cases indicates that this topic has not been addressed to any significant extent over the years, and that the experience has been uneven. In a limited number of cases, affirmative direct cases have been mounted; in others, there has been little or no alternative offered, and participants have focused on rebutting certain assumptions or perceived shortcomings in the filing.

Given the informal practice that has developed over time, it is in the interests of the general public for the Commission to use the additional stages of this rulemaking to pursue the question of whether affirmative direct cases, which were a fixture in Reorganization-era omnibus rate cases, are appropriate in N-cases. The undersigned Public Representative does not propose a specific answer at this time, but notes that section 3661 refers to an advisory opinion on the *Postal Service's* plan, not on an interested party's proposal.

2. Two Commenters Propose Eliminating Field Hearings

The Postal Service and Valpak oppose the use of field hearings in N-cases. They point, among other things, to the additional time associated with field hearings (including planning, travel, witness preparation and other tasks) and the limited evidentiary usefulness of the data and information presented at the field hearings.

Field hearings fall into the realm of discretionary practices. The APA does not specifically address them, and no existing Commission rule identifies them as a discrete procedural element. A review of N-case history indicates that the practice of holding field hearings emerged, on the Commission's initiative, in Docket No. N2009-1. The Commission also held field hearings in Docket No. N2010-1 (the "5-day Delivery" case). The Commission has not employed field hearings since the 5-day Delivery case.

The premise of holding field hearings in the referenced N-cases was to increase Commission outreach and facilitate public participation. This sentiment, on its face, is consistent with the interests of the general public in N-cases. At the same time, the Postal Service points out that the evidentiary weight that can be accorded field hearing testimony is typically extremely limited. It suggests, on balance, that there is limited utility in continuing the practice.

Given the additional time field hearings impose, their limited evidentiary weight, and the ability many members of the public and organized groups have to file formal and informal comments via the Internet or physical mail, the facial assumption that field hearings are necessarily consistent with the interests of the general public interest may not hold up under close scrutiny. This is especially the case now that the Commission has provided more structure and support for its Public Representative program. It is not clear whether revised N-case rules would need to prohibit the field hearing practice, as the Commission may see value in retaining this option. If it does retain the option, it might be useful if the Commission announced, at the outset of each case, its intentions

with respect to field hearings. This would place the Postal Service and others on notice, and they could factor this stage of the proceeding into their plans.

3. The Postal Service Suggests Eliminating the *Federal Register Notice*

The Postal Service correctly notes that the Commission recently eliminated the *Federal Register* notice requirement in “A” cases (appeals of post office closings and consolidations). It suggests eliminating this practice in N-cases.

Eliminating the *Federal Register* notice, in itself, seems to offer little benefit in the way of expedition. In addition, there are two notable differences between A-cases and N-cases. First, a post office closing typically involves one community, relatively few postal patrons and postal employees, and limited financial and operational consequences. N-cases, by definition, are large-scale changes involving many issues, patrons, and employees.

Second, persons appealing a post office closing typically receive *actual* notice of the Commission’s receipt of a petition and at least some other developments. This means they do not need to rely on publication of a notice in the *Federal Register* to learn of the schedule and other matters. In contrast, all parties affected by an N-case do not routinely receive actual notice of a N-case. And, while some may argue the practical efficacy of notice in the *Federal Register*, continuing this practice typically would satisfy any due process concerns about official notice to the public. Given the questionable time gains, a rule change of this nature would, at best, only marginally change the existing landscape.

4. The Postal Service Suggests Shorter Intervention Periods

The Postal Service's perception is that the deadline for intervention often operates as the *de facto* start of "active" participation in terms of filing interrogatories and data requests. At the same time, a shorter intervention period, as the National Newspaper Association notes, can place strains on participants because directors' approval and funding commitments are involved. This is an area where balancing interests clearly comes into play. It would be useful to know consider whether a suitable compromise can be achieved by changing the nomenclature in N-cases, perhaps with two "deadlines." Under this approach, filing by the second "deadline" would still be considered timely, and no order or ruling addressing the filing would be needed. The Commission could couple the "phased deadlines" with strong encouragement to start active participation as soon as possible.

III. CONCLUSION

As stated in the first set of comments filed in this rulemaking, the Commission's Advance Notice serves the interests of the general public by signaling a willingness to take a fresh look at the N case process, while affirmatively recognizing that any proposed new procedures may require procedural safeguards "to assure meaningful public participation and the Commission's decisions are helpful to the Postal Service." Public Representative Comments at 2, citing Order No. 1309 at 7 (June 18, 2012).

The undersigned continues to believe that the interests of the general public in this rulemaking lie in balancing stakeholders' interests in N-cases so that agency rules and related internal practices foster development of a sound record, and do so in ways that allow the Commission to provide the Postal Service with expert advice as close as practicable to the intended implementation date of the proposed service change.

The Commission's longstanding rules provide that N-cases are subject to rule 30's requirement that presiding officers: ". . . direct the order of presentation of

evidence and issue such other procedural orders as may be necessary to assure the orderly and *expeditious* conclusion of the hearing.” (Emphasis supplied.) So, despite the absence of a deadline for a decision, the original rules reflected an appreciation of the need for expedition, and the expectation that Commission proceedings, including N cases, would be guided by this principle. It is consistent with the interests of the general public for the Commission to consider ways to honor this understanding, and to expedite N-cases by adopting reasonable changes that provide due process.³

Respectfully submitted,

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³ A law review article of interest, notwithstanding its date of publication, is Henry J. Friendly's *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1279-94 (1975). It addresses fundamental due process considerations in agency decision-making.